ment for the plaintiff under section 41(2) against the 2nd defendants of the Workmen's Compensation Ordinance in the sum of $7,200. There will be no order as to costs."

Mr. Rajah for the respondents contends that Rules 25 and 19(4)(e) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 have not been complied with.

Rule 25 reads:

"On the application of any person ... the judge of the High Court who gave or made the same shall, *unless the judgment was written, certify in writing the grounds of such judgment* or order; but delay or failure so to certify shall not prevent the appellant from proceeding with his appeal." (the italics is mine).

Rule 19(4)(e) reads:

"The appellant shall attach to such memorandum copies of the proceedings in the High Court, including:

(e) the certificate, if any, given by the judge of the *grounds of his judgment* or order or, if a *written judgment* was delivered, a copy thereof;" (Here again, the italics is mine).

Mr. Rajah argues that what is in the Appeal Record is a mere finding by the learned trial judge, in other words, a conclusion upon an inquiry of fact and that this finding was neither a certificate of his grounds of judgment nor a copy of his written judgment.

The term "judgment" is sometimes used in different senses. It may mean "a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding, or in one of the questions, if there are several... The term "judgment" is also used to denote the reasons which the court gives for its decisions; ..." (See 'The Dictionary of English Law' by Earl Jowitt).

In the context of the Rules 25 and 19(4)(e) it is abundantly clear that the last mentioned meaning should be given to the term and that a "written judgment" must indeed be synonymous with "grounds of judgment", and must denote the reasons which the court gave for its decision.

Coming back to the finding as recorded by his Lordship, that "the accident had occurred because of the sudden brake failure on account of some latent defect in the braking system" which had been mistakenly regarded by appellants as grounds or reasons. I would say, with respect, that his Lordship in paraphrasing the "Particulars" given in the Statement of Defence was merely declaring his agreement with the defence raised in the pleadings, and not giving reasons for so agreeing.

I would therefore allow the objection and order appellants to comply with the requirement of Rule 25 by applying forthwith for a certificate of the grounds of judgment.

It would perhaps be pertinent to observe that the abovementioned rule also provides that delay or failure by the trial judge to certify in writing the grounds of his judgment shall not prevent the appellant from proceeding with his appeal.

Costs should be costs in the cause.

Solicitors: *Wong & Paramjothy; Lovelace & Hastings.*

LONG BIN SAMAT & ORS. v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Ali Hassan and Wan Suleiman F.JJ.) August 10, 1974]

[Kota Bharu — Federal Court Criminal Reference No. 8 of 1973]

Criminal Law & Procedure — Summary trial before magistrate — Accused charged, tried and convicted on a lesser offence — Evidence given of more serious offence — Whether trial a nullity — Powers of Public Prosecutor — Federal Constitution, art. 145(3) — Criminal Procedure Code (F.M.S. Cap. 6), s. 376(i).

In this case the accused had been tried and convicted before a Magistrate's Court of the offence of voluntarily causing hurt by means of an instrument for cutting, namely a parang, an offence punishable under section 324 of the Penal Code. In the course of trial it transpired that the hurt suffered by the victim was grievous hurt. The learned magistrate ignored this evidence and went on with the trial at the end of which he convicted and sentenced the accused as charged under section 324 of the Penal Code. On appeal to the High Court it was contended that as the victim's hurt was grievous the accused should have been charged and tried under section 326 of the Penal Code, which prescribes a penalty of penal servitude for life or ten years' imprisonment and that as such a charge would have been beyond the jurisdiction of the magistrate, the trial in this case was a nullity. In the High Court, Ibrahim J. held that the trial was not a nullity but he referred the following question to the Federal Court —

> "Whether in view of the fact that the accused were charged under section 324 of the Penal Code and tried by the magistrate in the lower court and decided therein the facts clearly disclosed an offence under section 326 of the Penal Code the said trial was a nullity?"

Held: (1) the Public Prosecutor is given wide discretion over the control and direction of all criminal proceedings and can in particular decide to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court;

(2) the trial in this case was not a nullity and therefore the question referred to the Federal Court must be answered in the negative.

Public Prosecutor v. *Lee Hor Sai*(6) and *Public Prosecutor* v. *Karnal Singh*(7) disapproved.

Cases referred to:-

(1) *Muniandi* v. *Public Prosecutor* [1963] M.L.J. 153.
(2) *Mahbub Shah* v. *Emperor* A.I.R. 1945 P.C. 118.
(3) *Isa bin Che Noh & Ors.* v. *Public Prosecutor* [1956] M.L.J. 93.
(4) *Man & Anor.* v. *Samsah* (1877) 3 Ky. 99.
(5) *Sahat* v. *Haji Brahim* (1888) 4 Ky. 337.
(6) *Public Prosecutor* v. *Lee Hor Sai* [1969] 1 M.L.J. 16.
(7) *Public Prosecutor* v. *Karnal Singh* [1970] 1 M.L.J. 49.
(8) *Public Prosecutor* v. *Viran* [1947] M.L.J. 62.
(9) *King-Emperor* v. *Ayyan* I.L.R. 24 Mad. 675.
(10) *Bapoo* v. *Rex* [1935] M.L.J. 19.
(11) *Smedleys Ltd.* v. *Breed* [1974] 2 All E.R. 21.

FEDERAL COURT.

A. Gomez for the appellants.

Lamin bin Haji Yunus (Deputy Public Prosecutor) for the respondent.

In the court below (*A. Gomez* for the appellants, and *Datuk Abu Mansor* (Deputy Public Prosecutor) for the respondent) the following judgment was delivered:

Ibrahim J.: This is an appeal by the three appellants who were convicted and sentenced to $900 fine in default 6 months imprisonment each by the learned Magistrate, Bachok, on the following charge: —

"You are jointly charged that you on 14.9.71 at about 9.30 p.m. at Kampong Kemudu Bongkok, Gunong, in the district of Bachok, in the State of Kelantan, voluntarily caused hurt to one Che Mat bin Mat Hj. Awang by means of an instrument for cutting, to wit, a parang, and that all of you were acting at the same time and place together in furtherance of an intention which was common on all of you and that you have thereby committed an offence punishable under section 324 of the Penal Code read together with section 34 thereof."

Briefly the prosecution case is that on the night in question the said Che Mat bin Mat Hj. Awang (PW2) was on his way to a fishing ground in the padi fields (marked F in the sketch plan (P2) subsequently prepared by the Investigating Officer (PW7) about 40 depas away from his house (marked B in P2) and when he switched on his torch soon after he left his house he saw the 3 appellants whom he had known before about 30 depas away. It was then raining with occasional flashes of lightning. All the 3 appellants were armed, the first with a parang, the second with a pedang and the third with a kapak. On being flashed at the 3 appellants charged at him in the course of which the first appellant threw a piece of wood at him. He took to his heels but he fell down at a spot (marked C in P2) about 1 depa behind the house (marked A in P2) of Mat Jusoh bin Hamat (PW3) and was slashed several times by the first appellant. He subsequently lost consciousness. About 10 minutes after he heard the commotion PW3 came out of his house and went to the scene where he saw PW2 lying on his back. He was bleeding and groaning in pain and when he asked him how he was injured PW2 told him that some persons were responsible for his injuries but he did not name those persons. Bakar bin Musa (PW4) whose house was about 100 depas away then came to the scene and he raised PW2 up. Later other persons including the Penghulu (PW1) came and at about 11.40 p.m. the same night PW1 lodged a report to the police (P1). PW1 did not know whether PW2 was conscious or not.

PW2 was taken to the hospital where he was examined by Dr. Rusli bin Hussein (PW8) at about 1.45 a.m. on 15 September, 1971. The examination showed that PW2 had multiple incised wounds varying from ½" to 6" in length on various parts of his body and his left middle finger was totally amputated at the middle portion. The injuries could have been caused by a sharp and narrow-edged instrument. PW2 was not discharged from the hospital until 27 November, 1971.

The learned Magistrate found that a *prima facie* case had been made out against all the 3 appellants and he called for their defence. In their defence each of the appellants put up an alibi and brought several witnesses to substantiate his story. The first appellant testified that on the night in question he and his wife were in one Haji Ibrahim's house studying the Koran in preparation for a pilgrimage to Mecca and he called his wife (DW1) and the said Haji Ibrahim (DW18) to substantiate his story. The second appellant testified that he was in his house the whole of that night and asserted that he could not have gone out of his house because he was having malaria and in support of his story he called his wife (DW14) and a Hospital Assistant (DW8) who had treated him for malaria. The third appellant who was a taxi driver also testified that he was not at the scene on the night in question. He gave a long story of his whereabouts on 14 September, 1971. He left Kota Bharu at 10 a.m. and reached Kuantan at about 3 p.m. He returned from Kuantan and arrived at the taxi stand in Kota Bharu at about 10 p.m. After refuelling his taxi he returned home arriving there at about 12 midnight. He called 10 witnesses to substantiate his long story.

The learned Magistrate however did not accept their defence and found each of the appellants guilty. In respect of the first appellant the learned Magistrate in his grounds of judgment (at page 58 of the record of appeal) said: —

"Considered in its entirety the explanation of the three witnesses was unreasonable in the circumstances and I rejected it as unsound. In this connection I also tested it against the prosecution evidence but found the defence had not raised a reasonable doubt in the prosecution's case."

On the second appellant's defence the learned Magistrate (at page 60) said: —

"On the whole the only acceptable evidence was in connection with the story of the estranged relationship between the second accused and PW2 centering on the former's wife and child and which later involved the first and third accused. Other than that, I was satisfied that the defence was unsound and therefore rejected it. Nor was there any evidence in the defence case which created reasonable doubt in the truth of the prosecution's case."

Dealing with the defence of the third appellant the learned Magistrate (at page 63) said: —

"Considered as a whole then the accused case exposed itself to too many weaknesses at material points to be accorded any merit. In the circumstances I was satisfied the defence was not sound and rejected it .... there was no evidence to raise a reasonable doubt in my mind as to the truth of the prosecution's case, ..."

There are various grounds of appeal, some of which overlap (ground (a) and (e) and grounds (g) and (k)) and some are abandoned (grounds (f), (h) and (i)). Among other things it is contended that the learned Magistrate had erred in law and in fact in calling for the defence as the prosecution had not discharged the burden of proof and therefore there was no *prima facie* case for the appellants to answer (grounds (a) and (e)) specifically when —

(i) there was no conclusive proof of the nature of the weapon that was used (ground (b));

(ii) a common intention was not proved (ground (c)).

Regarding (i), though PW2 had said that the first appellant was armed with a parang and a parang (P3) was subsequently found in the adjoining rubber land (marked D in P2) the learned Magistrate in his grounds of judgment (at page 50) found that "there was in fact no evidence to show that a specific weapon was used" because no blood-stain was found on P3 and there was some contradiction between the evidence of PW7 and PW5 who was alleged to have found it. As according to PW8 a sharp and narrow-edged instrument could have caused the injuries sustained by PW2 and as the length of the injuries varied from ½" to 6" the learned Magistrate was satisfied (at page 51) that "the instrument used was sharp-edged and for cutting purpose." As in my view it is sufficient for the learned Magistrate to make such a finding for the charge to be established

I see no merit in this ground of appeal. In *Muniandi* v. *Public Prosecutor*[1] which was an appeal against a conviction on a charge under section 326 of the Penal Code Thomson C.J. (as he then was) after citing the relevant portion of the said section 326 at page 154 said: —

"In our view the meaning of that is crystal clear .... there is an offence if the instrument used is one for cutting...."

In respect of (ii) it is convenient at the outset to refer to *Mahbub Shah* v. *Emperor*[2] where Sir Madhavan Nair at page 120 said: —

"... To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

Though PW2 had said that the first appellant had slashed him with his parang he was not sure whether the second and third appellants had also joined him in the actual attack which took place in the dark and it is contended that common intention within the meaning of section 34 of the Penal Code had not been established against the second and third appellants, as was the case in *Isa bin Che Noh & Ors.* v. *Public Prosecutor*[3] which was also an appeal against the conviction of 3 appellants on a charge under section 324 of the Penal Code where a parang was used. The brief facts of that case were that the complainant and another man were walking along a path at about 8 p.m. in the vicinity of their village when they were apprehended by the 3 appellants walking in single file with the first appellant some distance in front of the other two. The first appellant asked the complainant who he was and then attacked him and a fight took place between them. The only evidence against the second and third appellants was that they joined in the fight for a short duration, punched the complainant and then ran away. In the course of the fight the first appellant struck the complainant with a parang. It was *held* that —

"the evidence in this case was insufficient to establish beyond reasonable doubt that there was in fact any pre-arranged plan to assault the complainant with a 'parang' between the three accused and therefore the convictions of the second and third appellants must be set aside."

The facts in that case however were quite different from the facts in this case in relation to which the learned Magistrate (at page 55) said: —

"As regards the assailants' intention I have noted earlier that the size of the weapon used in the assault must have been more than six inches long, a fact which prevented it from being safely concealed from the second and third accused's knowledge, the evidence showing as it did that it was only the 1st accused who assaulted PW2. Coupled with the time and place chosen by the three accused to launch the assault it clearly indicated the existence of a community of purpose among the three accused to cause the hurt actually caused on the person of PW2."

Furthermore the second and third appellants who were also armed, with a pedang and a kapak respectively, had also charged at PW2 together with first appellant when PW2 flashed his torch at them and I see no reason why I should interfere with the learned Magistrate's finding on this and therefore reject the appellants' contention.

Most of the other grounds of appeal may be grouped under the general heading that the learned Magistrate's finding was unreasonable or could not be supported by and therefore against the weight of evidence (grounds (g) and (k)). It is contended that there was no corroboration of PW2's evidence (ground (k)(i)), that there were inconsistencies not only in his evidence but also in that of other prosecution witnesses (ground (d)) and that due weight had not been given to the evidence of the defence, in particular that of DW15 (ground (k)(ii)) in relation to the identity of the 3 appellants. As these grounds of appeal are directed against the finding of facts by the learned Magistrate and as the learned Magistrate had given elaborate reasons for making those findings and as there is sufficient evidence to support those findings I see no reason why I should interfere with them. I do not propose to deal at length with the evidence and the learned Magistrate's findings on them but would only refer briefly to some of them. Under section 134 of the *Evidence Act, 1950* no particular number of witnesses shall in any case be required for the proof of any fact and as there was no eye-witness present when the attack on PW2 took place only evidence of PW2 was available and since the learned Magistrate has accepted his evidence that would be sufficient. The discrepancies in the evidence of PW2 as to whether the other 2 appellants had actually joined in the actual attack and the discrepancy between evidence of PW7 and PW5 regarding the finding of P3 could not be said to be so material as to affect the veracity of the evidence of those witnesses as a whole. As to the identity of the accused the learned Magistrate in his grounds of judgment (at page 53) said: —

"... The 30 depa distance (separating him from his assailants) he gave was nothing more than an approximate guess and must not be taken at its face value. Arithmetical imprecision had not been expressed more clearly than in the mind of a man who underwent very little or no formal education and there are many like him. Such being the case, and the facts that the parties had known each other before; that PW2 had his torchlight on the assailants and the occasional lightnings I was left with no doubt that PW2 could and did see and identify his assailants as the three accused. Moreover, he knew it was the 1st accused who struck him."

Further on (at pages 55 and 56) he specifically dealt with DW15 and his evidence.

The remaining ground of appeal against conviction is that on the evidence disclosed and the findings of the learned Magistrate the trial was a nullity (ground (j)). PW8's evidence which was accepted by the learned Magistrate shows that the left middle finger of PW2 was amputated at the middle and that PW2 was hospitalized from 15 September, 1971 to 27 November, 1971. The hurt caused on PW2 was therefore "grievous" within the meaning of section 320 of the Penal Code and it is contended that the 3 appellants should have been charged and tried under section 326 of the Penal Code and as that would be beyond the

jurisdiction of the learned Magistrate the trial in this case was a nullity. In support of this contention the court was referred to 2 ancient and 2 recent cases. One of the ancient cases is that of *Man & Anor.* v. *Samsah*[4] which is digested as Case No. 1547 in *Mallal's* Digest of Malaysian & Singapore Case Law, Third Edition, Volume I, as follows: —

"1547. — s. 325 — *Grievous hurt — Bone Broken — Jurisdiction.*] — Where, in an attack on a person, a bone is broken, this makes the offence 'grievous hurt', under the Penal Code; and a magistrate has no jurisdiction to dispose of the case summarily. The evidence in the case showed that the respondent had been attacked, and a bone of his finger broken; the magistrate having tried the appellants summarily and convicted them of voluntarily causing hurt, this court quashed the conviction as having been made without jurisdiction, and directed the case to be remitted to the magistrate to be heard as a preliminary proceeding, and committed to the Assizes."

The other case is *Suhat* v. *Haji Brahim*[5] which is digested in the same Digest as Case No. 1548 as follows: —

"1548. — — *Wound treated in hospital for twenty-three days.*] — A person who inflicts a wound on another is answerable for the results, if the results follow without unreasonable conduct on the part of the man wounded. Where, therefore the prisoner inflicted a wound on the prosecutor which in itself was not a serious wound, but the prosecutor omitted to obtain proper and immediate remedies, by reason whereof the wound got into an unhealthy state and only after it got to that state the prosecutor was sent to the hospital where he was kept by the medical officer for treatment for twenty-three days during which time he was unable to follow his ordinary pursuits, **Held:** the foul state of the wound and the consequent detention in hospital must be considered the result of the prisoner's act, and the case was therefore one of grievous hurt under section 325 of the Penal Code, and not simple hurt under section 323, and a magistrate's conviction for the latter could not sustained as he had no jurisdiction over a case of grievous hurt."

The two recent cases are *Public Prosecutor* v. *Lee Hor Sai*[6] and *Public Prosecutor* v. *Karnal Singh*[7] in each of which Ong Hock Sim J. (as he then was) held that the trial in the lower court was a nullity on the ground that grievous hurt had been caused and the charge framed should be one under section 326 of the Penal Code over which the Magistrate or President had no jurisdiction.

The decision in *Public Prosecutor* v. *Viran*[8] however shows that a trial in the lower court of an offence over which it has jurisdiction is not a nullity merely because the same facts might disclose a more serious offence which is beyond its jurisdiction. The headnote of that case reads as follows:

"In this case the accused was charged before a District Court under section 4(ii) of the Arms Enactment and under Rule 76 of the rules made under section 5 of the Explosives Enactment respectively with being in possession of four cartridges. On the day upon which the accused was before the District Court, the Firearms and Ammunition (Unlawful Possession) Ordinance 1946 had come into force. The district judge thought it right to frame new charges under section 3 thereof and as the maximum punishment under that section was ten years' rigorous imprisonment he transferred the case to the magistrate to hold a preliminary enquiry with a view to the committal of the accused to the Assizes. It was against this order of the district judge framing the new charges and remitting the case for preliminary enquiry that the appeal was brought on behalf of the Public Prosecutor.

Held, (1) that, by virtue of section 27 of the Interpretation and General Clauses Enactment (corresponding to section 4(g) of the Interpretation Ordinance of the Straits Settlements, where the law provides, either in the same or different Enactments, for different penalties for the same offence, both or all of the provisions as to punishments are intended to stand side by side and it is left to the proper authorities to decide under which of the different provisions the offender shall be prosecuted and punished;

(2) that, in this case the order made by the district judge remitting the case to the Magistrate's Court for preliminary enquiry was wrong, as the district judge had jurisdiction to try the accused under the two charges preferred against him and should therefore have proceeded to hear the evidence or at least to hear the prosecution open the case;

(3) that the district judge can act under section 177 of the Criminal Procedure Code if upon the facts of the case it appears to him that the case ought to be tried by the High Court and in that case, he can either transfer by sending the case to a magistrate or himself proceed under Chapter XVII of the Criminal Procedure Code."

Spenser-Wilkinson J. at pages 64 and 65 said: —

"This brings me to the question of the alleged discretion of the Public Prosecutor to decide under what provision of law an offender who has contravened the provisions of various different sections shall be prosecuted. It is contended on behalf of the Public Prosecutor that under section 376 of the Criminal Procedure Code he has a discretion to decide what the charge shall be in any particular case. I do not think 'discretion' is quite the right word, for the real discretion is clearly given by the Code to the court. The position appears to me to be that, having the control and discretion of criminal prosecutions under the Code, the Public Prosecutor has a duty to conduct prosecutions in the best interests of justice. If, in his opinion, an offender is guilty of a technical or trivial offence and should therefore be prosecuted under some section which provides a light punishment, although such offender would be liable to a heavier punishment under some other provision, then it is his duty to act accordingly and to put the matter before the court in the way which in his opinion upon the material before him he considers to be right. He will be aware that the course he has advised may not, when all the evidence has been given, commend itself to the court which tried the case, but in the majority of cases the prosecuting officer will be in a position in the early stages of a prosecution to know the type of case with which he is dealing and is therefore the best judge as to the form in which the proceedings should be initiated. If in the course of the proceedings it appears to the court upon the facts disclosed that the offender ought to be prosecuted under some other section, the court undoubtedly has a discretion to amend the charge or to remit the case to some higher court. This is judicial discretion and if properly exercised will not be interfered with. On the other hand, I do not think it is incumbent upon a court to interfere with the procedure adopted by the prosecution unless and until on the evidence or other material before it the court is satisfied that some different course ought to be adopted."

It is true that in the above-cited case the different penalties were provided not in the same but in different enactments but as pointed out by Spenser-Wilkinson J. (at page 64) section 27 of the F.M.S. Interpretation & General Clauses Enactment (Cap. 1) and section 4(g) of the subsequent Interpretation Ordinance No. 131 (with which section 50 of the Interpretation & General Clauses Ordinance, 1948 is similar) equally apply where the different penalties are provided in the same enactment. In *King-Emperor* v. *Ayyan,*[9] where the accused were tried and convicted by a Deputy Magistrate under a charge under section 193 of the Penal Code it was held on appeal to the Court of Sessions that as the facts indicated an offence under section 194 of the Code the Magistrate had no jurisdiction to try the appellant for an offence punishable under section 193. In the High Court the order of the Court of Sessions was set aside and the order of the Magistrate restored. The following is an excerpt from pages 474 and 475 of the judgment of the Indian High Court: —

"... In the present case the Deputy Magistrate did not try accused for an offence beyond his jurisdiction. He tried him for an offence punishable under section 193, Indian Penal Code, *i.e.*, for an offence triable by a First-class Magistrate and therefore within his jurisdiction. His proceedings therefore were not void and the sessions judge was wrong in treating them as void. Where the facts disclose an offence within the jurisdiction of the magistrate it seems to us a complete fallacy to say he is not empowered by law to try the person charged for the offence which is within his jurisdiction, because the same facts disclose more serious offence which is beyond his jurisdiction. He is expressly so empowered. Whether in so doing he adopts a proper course is another question. No doubt it is improper on the part of a magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction, as, for instance, if a Second-class Magistrate should ignore the violence used in committing theft and should deal with the case himself as one of theft (section 379) instead of sending the accused before a First-class Magistrate to be tried for robbery (section 392). Here the action of the Second-class Magistrate would be improper but his proceedings would not be void. If the improper action of a Second-class Magistrate had led to a failure of justice as, for instance, by causing the punishment to be inadequate, it would be open to the proper authorities to apply a remedy by instituting a second prosecution on the same facts for the more aggravated offence (section 403, Criminal Procedure Code). It would also, in our opinion, be open to the revising and appellate authorities to set aside the magistrate's proceedings and order a fresh trial, if such a course was required in the interests of justice but not otherwise; and the reason for setting them aside would be, not that they were void *ab initio*, but because they were improper and the interests of justice required them to be set aside. The sessions judge has failed to appreciate the difference between proceedings which are without jurisdiction and therefore void, and proceedings which are improper and therefore liable to be set aside, though not void. It is this failure which we think, has led the sessions judge to misunderstand the various judgments of this court to which he refers. Whether the High Court as a Court of Revision or the Appellate Court ought to interfere in any particular case depends entirely on the facts of the case and whether such interference is called for in the interests of justice."

The above decision was followed in *Bapoo* v. *Rex*[10] where among the cases referred to by the appellant's counsel was *Man & Anor.* v. *Samsah.* The head-note in that case reads as follows: —

"The accused was charged before the Criminal District Court with kidnapping, an offence punishable under section 363 of the Penal Code and convicted. In fact the evidence would have supported a charge of kidnapping a woman to compel her marriage under section 366 of the Penal Code, an offence cognizable only by the Supreme Court. The accused appealed against the conviction on the ground that the District Court had no jurisdiction to try the accused since the evidence disclosed an offence cognizable only by the Supreme Court.

Held, that the district judge, having properly exercised his discretion under section 183(2) of the Criminal Procedure Code, was entitled to dispose of the case summarily and the Appellate Court would refuse to set the proceedings aside."

I am inclined to agree with the decisions in the 3 cases immediately referred to above. Having the control and direction of criminal prosecution and proceedings given to him by section 376(i) of the Criminal Procedure Code the Public Prosecutor has a duty to conduct prosecutions in the best interests of justice and it is significant that in this case the prosecution had sought fit to reduce the charge to one under section 324 from one under section 326 of the Penal Code with which the 3 appellants were at first tentatively charged. As the 3 appellants were tried by the learned Magistrate with an offence under section 324 of the Penal Code which was within his jurisdiction it cannot be said that the trial was void merely because the facts adduced in evidence disclosed a more serious offence which was beyond his jurisdiction. Under section 177 of the Criminal Procedure Code the learned Magistrate had a discretion to dispose of the case summarily or to proceed under Chap. XVII thereof and I cannot say that the course taken by the learned Magistrate in this case was improper and had led to a failure of justice. A particular instance referred to in the judgment of the Indian High Court of an improper action to dispose of the case summarily is inadequacy of punishment and as the sentence ultimately imposed on each of the appellants were far below the maximum the learned Magistrate was empowered to impose it cannot be said that he had not taken the proper course. It is true that the injuries caused to PW2, as with all other injuries which amount to grievous hurt, could not be said to be "technical or trivial" but those words were used by Spenser-Wilkinson J. in the context of whether a charge under a lighter or heavier penalty should be preferred against the offender. It is significant that in the two Penang cases before him Ong Hock Sim J. (as he then was) had emphasised the very serious nature of the injuries inflicted on the victims and in view of what he said (at page 49) in *Karnal Singh's* case that "it is clear that it was a proper case for trial under section 326 P.C." and the reference he made to provision of section 188(2) of the S.S. C.P.C. (which is equivalent to section 177 of the F.M.S. C.P.C.) his judgments in the two cases would appear to be not irreconcilable with the three other judgments which I am following in the sense that the trials were not void *ab initio* but have nevertheless been set aside because they were improper and the interests of justice required them to be set aside. I therefore do not accept this ground of appeal.

In the event I dismiss the appeal against conviction. I also dismiss the appeal against the sentences (ground (1)) which I do not consider to be manifestly excessive. The conviction and sentences are confirmed.

On reference to the Federal Court, the following judgment was delivered:

Suffian L.P.: This is a reference under section 66 of the Courts of Judicature Act, 1964, by Ibrahim J. reserving for the decision of this court a question of law of public interest, the question being:

"whether in view of the fact that the accused were charged under section 324 of the Penal Code and tried by the magistrate in the lower court and decided therein when the facts clearly disclosed an offence under section 326 of the Penal Code the said trial was a nullity."

The three accused were tried and convicted in the Bachok Magistrate's court of voluntarily causing hurt to one Che Mat bin Mat Haji Awang by means of an instrument for cutting, namely a parang, an offence punishable under section 324 of the Penal Code. Each of them was sentenced to a fine of $900 or in default six months' imprisonment.

The penalty provided by section 324 was three years or a fine or with whipping or with any two of such punishments.

Therefore the offences were within the jurisdiction of the learned Magistrate, for the amended section

85 of the Courts Ordinance, 1948, provides that he shall have jurisdiction to try all offences for which the maximum term of imprisonment does not exceed five years.

But in the course of the trial it transpired that the hurt suffered by the victim, Che Mat, was grievous within the meaning of section 320 of the Code. The learned Magistrate ignored this evidence and went on with the trial, at the end of which as stated he convicted the accused as charged under section 324.

It is contended that as Che Mat's hurt was grievous the accused should have been charged and tried under section 326 of the Penal Code which prescribes a penalty of penal servitude for life or ten years' imprisonment and that, as such a charge would have been beyond the jurisdiction of the Magistrate, the trial in this case was a nullity. For this proposition reliance in the High Court was placed on four cases, two of them very old, namely, *Man and Another* v. *Samsah*[4] and *Sahat* v. *Haji Brahim*[5] and two of them recent, namely, *Public Prosecutor* v. *Lee Hor Sai*[6] and *Public Prosecutor* v. *Karnal Singh*.[7]

In the High Court Ibrahim Manan J. held that the accused's trial was not a nullity and with respect we agree with him.

The first two cases reported in Kyshe (digested as cases Nos. 1547 and 1548 in *Mallal's* Digest, 3rd Edition and 1st Volume) must have been decided with reference to the then ordinances dealing with the jurisdiction of the courts, with criminal procedure and with the powers of the Public Prosecutor and as we have not seen these ordinances we are unable to determine the precise reason for the judgments which have been reported rather briefly.

It is obvious that today we have to determine the question before us in the light of the current statutes dealing with the jurisdiction of the courts, with criminal procedure and with the powers of the Public Prosecutor. The relevant provision of the statute dealing with the jurisdiction of the courts is section 85 of the Courts Ordinance to which reference has already been made, and it is quite clear from it that the learned magistrate had jurisdiction to try the charges before him.

Then references should be made to the provisions dealing with criminal procedure and with the power of the Public Prosecutor at whose instance these charges were brought.

The first of these provisions is subsection (i) of section 376 of the Criminal Procedure Code which provides:

"The Attorney-General shall be the Public Prosecutor and shall have the control and directions of all criminal prosecutions and proceedings under [the Criminal Procedure] Code."

and from this it would appear that the Public Prosecutor has a discretion as to what charges should be preferred, subject of course to the power of the court to amend charges in the course of a trial. That the law intends to give a wide discretion over criminal prosecutions to the Public Prosecutor appears from other provisions of the Criminal Procedure Code providing that for prosecution of certain offences his complaint is required (section 130) and yet for other offences his written sanction (section 129).

In an Indian case *Rex* v. *Ayyan and Anor.*[9] the accused were tried and convicted by a Deputy Magistrate on a charge under section 193 of the Penal Code. On appeal, the Court of Sessions held that, as the facts indicated an offence under section 194 of the Code, the Magistrate had no jurisdiction to try the appellants for an offence under section 193. In the High Court the order of the Sessions Court was set aside and the order of the Magistrate restored. In its judgment the High Court ruled that there is a distinction between proceedings which are without jurisdiction and therefore void on the one hand, and on the other, proceedings which are improper and therefore liable to be set aside, though not void. The following is an excerpt from the judgment:

"In the present case the Deputy Magistrate did not try the accused for an offence beyond his jurisdiction. He tried him for an offence punishable under section 193, Indian Penal Code, i.e., for an offence triable by a First-class Magistrate and therefore within his jurisdiction. His proceedings therefore were not void and the Sessions Court Judge was wrong in treating them as void. *Where the facts disclosed an offence within the jurisdiction of the magistrate, it seems to us a complete fallacy to say he is not empowered by law to try a person for an offence which is within his jurisdiction because the same facts disclosed a more serious offence which is beyond his jurisdiction.* He is expressly so empowered. Whether in so doing he adopts a proper course is another question. No doubt it is improper on the part of a magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction, as, for instance, if a Second-class Magistrate should ignore the violence used in committing theft and should deal with the case himself as one of theft (section 379) instead of sending the accused before a First-class Magistrate to be tried for robbery (section 392). Here the action of the Second-class Magistrate would be improper, but his proceeding would not be void. If the improper action of the Second-class Magistrate had led to a failure of justice, as for instance by causing the punishment to be inadequate, it would be open to the proper authority to apply a remedy by instituting a second prosecution on the same facts for the more aggravated offence (section 403, Criminal Procedure Code). It would also in our opinion be open to the revising and appellate authorities to set aside the magistrate's proceedings and order a fresh trial if such course was required in the interests of justice, but not otherwise; and the reason for the setting aside would be not that they were void *ab initio* but because they were improper and the interests of justice required they be set aside."

Ibrahim J. in the High Court refers to *Bapoo* v. *Rex*,[10] a decision of the Singapore Court of Appeal. There the appellant-accused was charged before the Criminal District Court with kidnapping, an offence punishable under section 363 of the Penal Code and convicted. In fact the evidence would have supported a charge of kidnapping a woman to compel her marriage under section 366 of the Penal Code, an offence cognizable only by the Supreme Court. The accused appealed against the conviction on the ground that the District Court had no jurisdiction to try the accused since the evidence disclosed an offence cognizable only by the Supreme Court. This contention was rejected. Huggard C.J. said at page 20: —

"If the contention of the appellant's counsel were to be accepted, it would follow that if the record when first laid before the Public Prosecutor disclosed the possibility of an offence of a more serious nature, the Public Prosecutor would be obliged to charge the accused with the more serious offence

regardless of the fact that the evidence in support of the lesser offence might be overwhelming and that that in support of the more serious offence might be doubtful and unsatisfactory. In our view this is opposed to the whole spirit of the Criminal Procedure Code, which is designed to give the Public Prosecutor or his Deputy a wide discretion in determining the actual charges to be preferred and in designating the court before which such charges shall be tried. (See Chapter XXXIV of the Criminal Procedure Code and in particular section 390). If it were otherwise, the Supreme Court would be burdened with the trial of charges upon which there was little or no hope of obtaining convictions, and accused persons would be harassed by having to stand their trial on charges which in many cases could never be substantiated."

In a later passage Huggard C.J. quoted with approval the excerpt from the judgment of the Indian case reproduced above, saying that the court accepted it as a correct statement of the law.

Ibrahim J. refers to a decision of Spenser-Wilkinson J. in *Public Prosecutor* v. *Viran*[8] and we agree with Ibrahim J. when he says that that case also shows that a trial in a subordinate court of an offence over which it has jurisdiction is not a nullity merely because the same facts might disclose a more serious offence which is beyond its jurisdiction.

There the accused was charged before a District Court —

(a) under section 4(ii) of the Arms Enactment with being a possession of a shotgun and

(b) under rule 76 made under section 5 of the Explosives Enactment with being in possession of four cartridges.

On the day when the accused was before the District Court, a new statute, the Firearms and Ammunition (Unlawful Possession) Ordinance, 1946, had come into force. The District Judge amended the two charges to bring them within section 3 of the Ordinance and as the maximum penalty was ten years' rigorous imprisonment he had no jurisdiction to try them and accordingly he transferred the case to the Magistrate to hold a preliminary enquiry with a view to committal of the accused for trial in the High Court. On appeal by the Public Prosecutor against this order it was held that the order was wrong, as the District Judge had jurisdiction to try the two charges preferred by the Public Prosecutor. Spenser-Wilkinson J. said at page 65:

"I have, therefore, come to the conclusion that the order made by the district judge ... was wrong. The district judge had jurisdiction to try the accused under the two charges preferred against him and should therefore have proceeded to hear the evidence or at least to hear the prosecution open the [their?] case. It is true that section 177 of the Criminal Procedure Code provides that where it appears *at any stage* of the proceedings that from any cause the case is one which ought to be tried by some other court the proceedings can be stayed and transferred to such higher court. But it appears from the district judge's grounds of decision that his reason for transferring the case to some court of higher jurisdiction was not so much the exercise of a discretion under section 177 as a finding that he had no jurisdiction to try the case.

The order of the district judge will be reversed, with the result that the accused will again come before the district judge for trial upon the original charges."

Such was the state of the authorities before independence. On independence the Federal Constitution came into force, and clause (3) of its Article 145 (as amended) provides: —

"The Attorney-General shall have power exercisable at his discretion, to institute, conduct or *discontinue* any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial."

In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-3 in *Smedleys Ltd.* v. *Breed*[11]). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

Anyone who is dissatisfied with the Attorney-general's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

It seems to us that Ong Hock Sim J. (as he then was) went too far in *Public Prosecutor* v. *Lee Hor Sai*[6] and in *Public Prosecutor* v. *Karnal Singh*[7] when he said that the trials there were a nullity.

It seems to us that, if his attention had been drawn to the authorities considered by Ibrahim J. in this case and to clause (3) of Article 145 of the Constitution, he would have drawn a distinction between on the one hand proceedings which are without jurisdiction and therefore void and on the other proceedings which are improper and therefore liable to be set aside, though not void, and that he might therefore have held the two trials to be at the most only improper, not a nullity.

We agree with the observation of Huggard C.J. in the Singapore Court of Appeal that, if the records when first laid before the Public Prosecutor disclosed the possibility of an offence of a more serious nature, the Public Prosecutor should not and could not be obliged by the courts to charge the accused with the more serious offence regardless of the fact that the evidence in support of the lesser offence might be overwhelming and that in support of the more serious offence doubtful and unsatisfactory. It is also well-known that the Public Prosecutor takes into account, and rightly so, the state of the backlog in the different courts in the country and often prefers to proceed in a lower court well knowing the delay that might result should he elect to proceed in a higher court. In any event, these days a First Class Magistrate such as the one who tried this case has ample powers of punishment for most types of offences against section 324 of the Penal Code, for since the two amendments to section 87 of the Courts Ordinance, first by Ordinance No. 49 of 1953 and then by P.U.(A) 521 of 1969, he may (1) sentence up to two years' imprisonment, and (2) if it appears to him that by reason of the accused's conviction or antecedents he should impose a more

severe punishment, he may impose the full punishment authorised by law, provided he records his reason for so doing — so that in this particular case though the learned Magistrate only sentenced each of the three accused to a fine of $900 or in default six months, he could if he had been so minded have sentenced each of them to three years' imprisonment.

A Magistrate should assume in most cases that the Public Prosecutor or his Deputy who has been associated with the investigation from an early stage would be quite content if the court were to sentence the accused up to the limit of its sentencing power, and a Magistrate should therefore be slow to conduct a preliminary enquiry and commit the accused for trial in the High Court. If a Magistrate feels strongly that the offence with which the accused is charged is serious, he can give expression to this feeling by imposing what he feels is the right sentence, rather than take action that might delay the proceedings and clog up the High Court.

In the instant case it is significant that originally the accused were charged under section 326 of the Penal Code but subsequently the prosecution reduced the charges to section 324. This shows that in the opinion of the Public Prosecutor each of the accused did not if convicted deserve more than three years. In the event each of them was only fined and there was no appeal by the prosecution against sentence.

For the above reasons we would answer the question referred to us in the negative.

Question answered.

Solicitors: *Mohamed Yaacob & Gomez.*

N. B. MENON v. ABDULLAH KUTTY

[F.C. (Suffian L.P., Ali Hassan and Wan Suleiman F.JJ.) August 17, 1974]

[Kota Bharu — Federal Court Civil Appeal No. 102 of 1973]

Partnership — Partnership carrying on business in premises of which one of the partners was tenant — Whether partnership becomes tenant of the premises.

In this case the appellant and the respondents were partners in running a restaurant in Kelantan. The respondent was the tenant of the premises but at the material time he was living far away in Johore and the appellant managed and ran the restaurant business. The respondent gave notice of the dissolution of the partnership to the appellant and subsequently gave the appellant notice to quit the shop. The appellant refused to do so and the respondent thereupon sued for vacant possession. The respondent succeeded in the High Court, whereupon the appellant appealed to the Federal Court. The sole issue on appeal was who in the circumstances of the case was the tenant of the shop, the respondent personally or the partnership.

Held, dismissing the appeal, on the facts of this case the respondent had not assigned the tenancy to the partnership and he was therefore entitled to have the premises back.

Cases referred to:-

(1) *Asmabi* v. *Motilal Doshi* [1960] M.L.J. 195.

(2) *Pocock* v. *Carter* [1912] Ch. 663.

(3) *Gian Singh* v. *Devraj Nahar* [1965] 2 M.L.J. 12.

FEDERAL COURT.

A. Wilson for the appellant.

Datuk H. L. Wrigglesworth for the respondent.

Suffian L.P.: Mr. Abdullah Kutty the plaintiff was tenant of a shop No. 40 Jalan Market, Pasir Mas town, where he ran a restaurant known as the Noorjihan Restaurant. He had a partner in the business, N. B. Menon the defendant. At the material time the plaintiff was living far away in Johore and the defendant managed and ran this restaurant business. On 15th February, 1970, the plaintiff gave notice of dissolution of the partnership to the defendant. Fifteen days later he gave the defendant notice to quit the shop on 31st May, 1970. The defendant refused to vacate. The plaintiff sued for vacant possession in the High Court. He won judgment and the defendant appeals to us.

There were several issues in the High Court, but here before us there is only one issue, namely, who in the circumstances of this case was tenant of the shop, was it the plaintiff personally or was it the partnership? The plaintiff says that he in his personal capacity was the tenant, that all the defendant had was an implied licence to occupy the premises during the continuance of the partnership subject to the partnership agreement and that such licence was duly terminated by the notice to quit. The defendant on the other hand maintains that on the facts of this case and under the partnership agreement the partnership became tenant of the shop in place of the plaintiff and that when the plaintiff gave notice dissolving the partnership the defendant became a statutory tenant protected by the Control of Rent Act, 1966.

The facts established by the plaintiff and not criticized before us are as follows. On 14th July, 1965, the plaintiff and the two owners of the premises (Omar bin Haji Awang and his younger brother Abdul Rahman bin Haji Awang) entered into a tenancy agreement in respect of the shop for a period of ten years from 1st May, 1965, on a monthly rent of $110 for the plaintiff to conduct business there "under whatever trade name" that he desires with the usual provision not "to assign, underlet or otherwise part with possession of the premises, or any part thereof to any person without the consent, in writing, of the first party (landlords)". The premises are rent-controlled premises. The plaintiff carried on his business under the trade name of Noorjihan Restaurant and on 8th February, 1967, he entered into a partnership agreement with the defendant, the relevant clauses of which read as follows: —

"2. The partnership shall be carried on as long as the partners desired with power to either partner to terminate the partnership at the expiry of three years from the date of the commencement of the partnership as aforesaid by giving to the other partner not less than three (3) calendar months' notice in writing of his intention. Such notice may be left at the principal place of business of the partnership for the time being.

3. Unless and until otherwise determined by the partners the said business of the partnership shall be carried on at No. 40, Jalan Market, Pasir Mas, Kelantan aforesaid.

4. The capital of the partnership shall be $6,000/- (Six thousand Dollars) to be contributed equally by the partners.

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